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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. ~~382~~ 70-9

THOMAS C. LYNCH, et al., *Appellants*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT AS AMICI CURIAE

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THOMAS C. LYNCH, et al.,
Appellants,
vs.
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BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT AS AMICI CURIAE

STATEMENT OF INTEREST OF THE AMICI

The NAACP Legal Defense and Educational Fund, Inc. (the "Legal Defense Fund") is a non-profit corporation formed in 1939 under the laws of the State of New York. It was founded to assist black people who suffer injustice by reason of race or color to secure their basic rights through the legal process. The Legal Defense Fund is independent of other

organizations and is supported by contributions from the public.

The central purpose of the Legal Defense Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon black people and upon the poor, deprived and friendless, who too often are black people. To further this purpose, in 1967 the Legal Defense Fund established a separate corporation, the National Office for the Rights of the Indigent ("NORI"), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine unjustly affecting the poor.

The Legal Defense Fund receives a very large volume of pleas for assistance from prisoners incarcerated in penal institutions and jails throughout the nation. Prisoners call upon the Legal Defense Fund to help in challenging constitutional error in their convictions and sentences, in coping with their civil problems (many of them relating to their indigency) and in bringing suits to achieve reform of outmoded and inhumane prison practices. The Legal Defense Fund and NORI cannot begin to provide representation or even counselling for the huge numbers of prisoners seeking their assistance.

The San Francisco office of the Legal Defense Fund receives a great number of requests for help from prisoners incarcerated in the State of California. Again, the prisoners request assistance and information not only with regard to the validity of their con-

victions and sentences, but also concerning their personal civil problems and their difficulties vis-à-vis the prison administration. They frequently ask us to reproduce and send them court decisions not otherwise available to them. While the Legal Defense Fund attempts to respond to as many of these pleas for assistance as possible, our limited staff and resources simply do not permit us to help in very many cases, regardless of whether the cases are meritorious. Accordingly, the Legal Defense Fund has a direct interest in having the states recognize their obligation to provide necessary legal resources for the persons whom they choose to imprison.

The Legal Defense Fund believes that the decision of the court below is sound as a matter of law and policy in recognizing that the state's denial of necessary legal resources to prisoners cannot be squared with the fundamental right of access to the courts, where such access is the only means of redressing a deprivation of liberty without due process. For this reason, we respectfully present our views on the issue before the Court. The parties have consented to the filing of a brief by *amici*, and copies of their letters of consent are being submitted to the Clerk with this brief.

OPINIONS BELOW

The opinion of the three-judge District Court, filed May 28, 1970, is reported at 319 F.Supp. 105 and is printed in the Appendix at pp. 92-106. The opinion

of the Court of Appeals for the Ninth Circuit on the jurisdictional question is reported at 400 F.2d 228 and is printed in the Appendix at pp. 28-32. The order of this Court denying certiorari to review the decision of the Court of Appeals is reported at 393 U.S. 1092 (1969).

JURISDICTION

This is an appeal from an order of a three-judge District Court convened pursuant to 28 U.S.C. Sections 2281 and 2284. On the assumption that the court below had jurisdiction to act as a statutory three-judge court, the jurisdiction of this Court on direct appeal is conferred by 28 U.S.C. Section 1253.[1]

QUESTION PRESENTED

Whether, by depriving indigent prisoners of legal resources necessary to present post-conviction challenges to errors in their convictions or sentences, California effectively denies them access to the courts in violation of the due process and equal protection clauses of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Convicted felons in California prisons whose convictions may be tainted by fundamental error face

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[1]Both parties to this appeal have previously filed briefs supporting the jurisdiction of this Court. *Amici* do not intend to brief this question.

special difficulties in obtaining judicial review of their claims. California has not implemented *Douglas v. California,* 372 U.S. 353 (1963), by requiring that convicted defendants be notified either of their right to appeal or of their right to assigned counsel. As a consequence, many defendants fail to appeal through ignorance of their rights, and must rely on post-conviction proceedings as the only means of challenging the legality of their convictions. Despite the crucial nature of these proceedings and the urgency of the prisoners' need, California has not adopted any of the techniques suggested by this Court in *Johnson v. Avery,* 393 U.S. 483 (1969), for providing essential legal assistance to prisoners seeking access to the courts.

Due process of law requires that prisoners be afforded effective access to the courts to challenge convictions obtained in violation of their constitutional rights. Depriving them of the legal assistance necessary for preparing and presenting these claims effectively denies prisoners access to the only forums empowered to settle their disputes. *Boddie v. Connecticut,* 401 U.S. ....., 91 S. Ct. 789 (1971). State officials may not obstruct access to the courts and, absent a countervailing state interest of overriding significance, due process requires that prisoners be given a meaningful opportunity to be heard. In short, post-conviction proceedings must be more than a formality; and the State must insure that those who cannot help themselves have reasonably adequate assistance in preparing and filing post-conviction pleadings. *Johnson v. Avery,* 393 U.S. 483 (1969).

The court below carefully considered what is required to obtain a hearing on a post-conviction petition and found that California prisoners were effectively barred from the courts by the denial of legal resources essential to the presentation of their claims. It held that the State's asserted interest in standardization and economy was not sufficient to justify depriving state prisoners of a meaningful opportunity to be heard. However, the court did not order the State to provide "expensive law libraries" or appointed counsel for prisoners. It simply required the state officials to submit a plan for providing indigent prisoners with the legal assistance necessary to present arguably meritorious claims in a manner that avoids summary dismissal.

California imprisons only a small proportion of persons convicted of felonies. Since those who are not incarcerated are free to seek gainful employment and hire an attorney, or to make use of the other legal resources available in free society; and since some imprisoned felons have sufficient monetary resources to retain an attorney to counsel them, do their research and draft their petitions, the court below correctly held that California denies equal protection to indigent prisoners. This Court has consistently made plain that indigent prisoners cannot be deprived of meaningful and effective access to the courts by economic barriers, and this is true in post-conviction proceedings as well as on direct appeal. See, e.g., *Gardner v. California*, 393 U.S. 367 (1969).

Having found that indigent prisoners in California were being deprived of due process and equal protec-

tion of the laws by the State's refusal to provide legal resources essential for effective access to the courts, the court below properly directed the state officials to submit a plan that would assure such access. The State can comply with the district court's order by utilizing one or more of the easily available, relatively inexpensive techniques for providing prisoners with necessary assistance. Use of such techniques would not only assure prisoners effective access to the courts, but would lighten the burden on state and federal courts in processing their applications.

The Eleventh Amendment does not bar the relief ordered by the district court, because this Court has repeatedly made plain that, in enforcing the Fourteenth Amendment, the federal courts may grant injunctive relief having the effect of requiring states to expend public funds in order to bring public programs into compliance with constitutional guarantees.

ARGUMENT

I. INTRODUCTION

A. The Post-Conviction Plight of California Prisoners

Those confined to California state prisons face special difficulties with regard to their ability to obtain judicial relief from illegality in such confinement. Despite this Court's decision in *Douglas v. California*, 372 U.S. 353 (1963), California does not have any requirement, whether by statute, rule of court or judicial decision, that convicted criminal defendants be notified either of their right to appeal

or of their right to assigned counsel on appeal.[2] In these circumstances, it is not surprising that the proportion of criminal defendants who appeal from their convictions is very small. For the years 1964 through 1968, only 5% of defendants convicted of felonies in California appealed their convictions. California Department of Justice, Bureau of Criminal Statistics, *Criminal Appeals in California, 1964-1968*, p. 12. The range is from less than 1% of those who entered pleas of guilty to more than one-third of those convicted by juries. *Id.* Given the fact that so few defendants appeal and the fact that the State does not require notification of the right to appeal with assigned counsel, it must be assumed that at least some of those who do not appeal fail to do so because of ignorance of their rights.[3] It is not clear whether California law provides a remedy for a defendant who thus loses his right to appeal. See *Still v. Fitzharris*, 413 F.2d 977 (9th Cir. 1969).

Moreover, even where a defendant does succeed in filing notice of appeal, the State fails in many cases

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[2] *Cf. United States ex rel. Smith v. McMann*, 417 F.2d 648 (2d Cir. 1969), where the Second Circuit *en banc* held that such a failure to provide procedures implementing *Douglas* violates defendants' constitutional rights.

Cal. Govt. Code Section 27706(a) (West Supp. 1971) defines the duty of the Public Defender in representing an indigent defendant. He is not required to prosecute an appeal to a higher court unless "in his opinion, the appeal will or might reasonably be expected to result in the reversal or modification of conviction." If he decides not to appeal, he has no obligation to file a notice of appeal, or to advise the defendant of his right to appeal or to obtain other counsel.

[3] *Cf. Swenson v. Bosler*, 386 U.S. 258, 260 (1967); *Goodwin v. Cardwell*, 432 F.2d 521 (6th Cir. 1971); *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969); *Cruz v. Beto*, 391 F.2d 235 (5th Cir. 1968).

to provide for adequate representation by court-appointed counsel. The rate of compensation is extremely low and it is frequently impossible to obtain experienced counsel. A report of the California Judicial Council states that

> "Most of the volunteers are recent admittees of the bar with little or no experience in the field of criminal law. As a result, the quality of representation is uneven and sometimes inadequate. In testimony before a legislative committee it was estimated that 30 to 40 percent of the appeals filed for indigents in criminal cases fell 'below an acceptable level of quality.'" See Judicial Council of California, *1970 Annual Report to the Governor and the Legislature*, p. 16.

The inevitable consequence of the failure of the State to provide adequate machinery for resolving on direct appeal defendants' claims of error in criminal convictions or sentences is that many such claims, including federal constitutional claims, must be presented in post-conviction collateral proceedings such as coram nobis and habeas corpus. Of course, even where defendants were adequately represented on direct appeal, claims of error dehors the record necessarily must be raised in collateral proceedings. In short, there is a heavy burden on post-conviction proceedings in California. Convicted felons are frequently forced to resort to collateral proceedings in order to correct fundamental errors in their convictions or sentences.[4]

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[4]See, e.g., *In re Williams*, 1 Cal.3d 168, 460 P.2d 984 (1969), where the indigent defendant who had been represented by the Public Defender and failed to file timely notice of appeal filed

The State of California imprisons only a small proportion of persons convicted of felonies.[5] The large number of convicted felons who are not in prison but who are placed on probation or who have been released on parole are free to seek gainful employment and to earn sufficient income to engage an attorney to represent them. They are also free to consult public law libraries at their leisure and to make use of whatever legal resources are available in the "free world," including legal services offices funded by the federal Office of Economic Opportunity. But the convicted felons whom California chooses to imprison are left virtually without any legal resources for preparing and conducting post-conviction collateral proceedings.

California has not adopted any of the techniques suggested by this Court in *Johnson v. Avery*, 393 U.S. 483 (1969), for providing legal assistance to prisoners

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three post-conviction proceedings before he—and the California Supreme Court—realized he had pleaded guilty to a crime he did not commit. When the indigent defendants in *In re Smith*, 3 Cal. 3d 192, 474 P.2d 969 (1970), and *In re Greenfield*, 11 Cal.App.3d 536, 89 Cal.Rptr. 847 (1970), finally succeeded in having their convictions overturned via *in propria persona* applications, the courts deplored the inadequacy of their court-appointed counsel on direct appeal. In *Greenfield*, the court said, "A half hour of rudimentary research . . . would have revealed a defense crucial to petitioner's case." 11 Cal.App.3d 544. See also *In re Banks*, 4 Cal. 3d 337, ___ P. 2d ___ (1971).

[5]For example, in 1969, there were 50,568 persons charged with felonies who were convicted in California courts. Of this number, 19,470 (38.5%) were given probation, 13,718 (27.1%) were given probation and a jail term and 7,020 (13.9%) were sentenced to short terms in county jails. Only 4,940 (9.8%) were sentenced to prison. California Department of Justice, Bureau of Criminal Statistics, *Crime and Delinquency in California 1969*, pp. 33, 108.

Moreover, of the 34,851 persons who on December 31, 1969, were under the jurisdiction of the California Department of Corrections, 11,833 (33.9%) were at large on parole. Only 23,018 were imprisoned in penal institutions under the jurisdiction of the Department. *Id.* at p. 37.

in the preparation of their post-conviction pleadings: unlike many states, California makes no provision for representation by a public defender or legal aid society in any proceedings after direct appeal[6]; the State has not adopted a program for utilizing law students in interviewing and advising prison inmates; the State has not undertaken any program whereby members of any bar association visit prisons to consult with prisoners concerning their cases; and the State has not trained able and literate prisoners to render assistance to others. 393 U.S. at 489.[7]

The Department of Corrections does provide a few law books in each of its twelve institutions but, as the court below found, these "libraries" are grossly inadequate even for the limited purpose of researching claims to be presented in post-conviction criminal proceedings. Indeed, this lawsuit was precipitated by the promulgation of a new regulation (App. 41) purporting to "standardize" the list of law books permitted in California prisons, but providing for the confiscation of law books or materials not on the prescribed list—a veritable book burning that would

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[6]A number of states have adopted working systems for appointed counsel in proceedings subsequent to appeal. See, e.g., *Ark. R. Crim. Pro.* 1D (Supp. 1969); *Ind. Rule P.C.* 1(I)(1) (Burns Spec. Supp. 1970); *Me. Rev. Stat. Ann.* tit. 14, § 5506 (1964); *Mo. Sup. Ct. R.* 27.26; *Mont. Rev. Code* § 95-1004 (1969 Rpl. Vol.); *N.C. Gen. Stat.* § 15-219 (Supp. 1969); *Ohio Rev. Code* §2953.24 (Page's Supp. 1970); *Ore. Rev. Stat.* § 138.590 (1969-70); *S.D. Sess. Laws* ch. 121, § 3 (1966); *Wyo. Stat. Ann.* § 7-408.4 (Supp. 1969).

[7]Indeed, California prohibited prisoners from helping each other with any legal work until after this Court's decision in *Johnson v. Avery.*

deprive California prisoners of a portion of the few legal materials they already have.

The action of the State of California and its Department of Corrections in incarcerating criminal defendants and then depriving them of the legal wherewithal for preparing and presenting constitutional claims to the courts takes its toll in swamping the courts, including the federal courts, with a continuing flood of *in propria persona* pleadings raising in piecemeal fashion the various claims that prisoners on their own can think of. As Chief Justice Burger has noted, prisoner reliance on federal courts to review state convictions and sentences produces not only a drain on the limited resources of the federal courts but also a strain on the relations between the parallel court systems. *Remarks on the State of the Federal Judiciary,* 56 A.B.A.J. 929 (1970). In fiscal year 1968-1969 alone, California prisoners filed 1,029 cases in the federal courts in California. *Annual Report of the Director of the Administrative Office of the United States Courts, 1969,* Table C3, p. 213. In the same fiscal year, they also filed 6,200 post-conviction petitions in the state courts of California. Judicial Council of California, *1971 Annual Report to the Governor and the Legislature,* 31. There is no way of knowing how many of the pleadings were frivolous or repetitious, or of knowing how much valuable time of judges and clerks was taken up in processing these applications. What is known is that a substantial amount of judicial time of both state and federal courts has been consumed in deciphering prisoner applications from California. It is not sur-

prising that many applications get short shrift and it is likely that many meritorious petitions are overlooked in the flood of frivolous ones. *Cf. Peters v. Rutledge,* 397 F.2d 731, 738 (5th Cir. 1968).

B. The Decision of the Court Below

The three-judge federal district court found that indigent prisoners in California were effectively denied access to the courts for the purpose of pursuing existing post-conviction remedies. The court carefully considered the State's argument that law "libraries" must be stringently limited in the interest of standardization and economy, and held that the paramount federal right of access to the courts must prevail. The court rejected the notion that an adequate opportunity for a prisoner to challenge his conviction or sentence in available state and federal forums is a "privilege" rather than a right and found unrealistic the State's argument that in post-conviction proceedings a prisoner requires no legal expertise and need only state the facts of his case in order to gain a judicial hearing. The court said that much more than recitation of simple "facts" is required to obtain relief by habeas corpus:

> "A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing. . . . 'Access to the courts,' then, is a larger concept than that put forward by the State. It encompasses all the means a defendant or petitioner might require to get fair

hearing from the judiciary on all charges brought against him or grievances alleged by him." 319 F.Supp. at 110 (App. 100).

It must be remembered that two of the three members of the court below are district judges who are confronted with California prisoner applications every day, and are intimately familiar with what it takes to get a judicial hearing in California.[8]

The court below held that by denying indigent prisoners the necessary legal resources to prepare an application for post-conviction relief, California effectively denied them access to the courts and equal protection of the laws. Contrary to the Attorney General's assertion in this Court, however, the district court did *not* order the state officials "to furnish prison inmates with extensive law libraries" or to provide prisoners with "professional or quasi-professional legal assistance." The court below specifically refrained from undertaking "the task of devising another system whereby indigent prisoners are given adequate means of obtaining the legal expertise necessary to obtain judicial consideration

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[8]The California Supreme Court also disagrees with the Attorney General's argument that a prisoner need only state "facts" in order to obtain judicial relief. Thus,

> "This court has itself recognized that some kind of access to legal materials is necessary to the preparation of any effective application for relief. '[A]lthough [an application] should ordinarily be predicated on a full and honest statement of the *facts* which the inmate believes give rise to a remedy (*In re Chessman* (1955) 44 Cal.2d 1, 10 (278 P.2d 24); *In re Swain* (1949) 34 Cal.2d 300, 302, 304 (209 P.2d 793)), the relevance of certain facts may not be apparent to him until he has done some legal research on the point.' (*In re Schoengarth, supra*, 66 Cal.2d 295, 305)." *In re Harrell*, 2 Cal.3d 675, 695, 470 P.2d 640, 653 (1970).

of alleged grievances cognizable by the courts" (App. 104). The court noted that "the alternatives open to the state are legion," and listed a few of the means by which other states or prison systems have provided for the legal needs of their charges (App. 101). Instead of enjoining the California officials to provide a library, or appointed counsel, or some other specific means of ensuring that prisoners are not left legally destitute, the court below simply ordered the officials to file new regulations providing either for expanded law libraries or for "some new method of satisfying the legal needs" of California prisoners (App. 104-05).[9] Thus, the shape of the legal assistance program is to be decided by the State.[10] Rather than submitting a plan or new regulations to the court below, however, the state officials have appealed to this Court, contending in effect that they are not constitutionally required to provide any legal resources at all to indigent California prisoners.

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[9]The court also enjoined the officials from destroying or removing law books and materials already available in California prisons (App. 105-06).

[10]As this Court has recently said with respect to the equity powers of federal courts where constitutional violations have been demonstrated,

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> • • •
>
> "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, ... U.S. ....., 91 S. Ct. 1267, 1276 (1971).

Here, the court below exercised its broad equity powers in the most restrained manner possible, by directing the state officials to develop their own appropriate methods rather than by mandating specific conduct or programs by the officials.

II. BY DEPRIVING INDIGENT PRISONERS OF NECESSARY LEGAL RESOURCES TO CHALLENGE THEIR CONVICTIONS OR SENTENCES CALIFORNIA EFFECTIVELY DENIES THEM ACCESS TO THE COURTS.

The constitutional prohibition against depriving a man of liberty without due process of law has, as a necessary corollary, the requirement that prisoners be afforded access to the courts to permit setting aside convictions obtained in violation of their federal constitutional rights. See, e.g., *Kaufman v. United States,* 394 U.S. 217, 226 (1969); *Johnson v. Avery,* 393 U.S. 483 (1969); *Mooney v. Holohan,* 294 U.S. 703, 713 (1935).

It has long been clear that the paramount interest in assuring prisoners access to the courts to present their federal claims invalidates prison regulations which effectively impair that right. *Ex parte Hull,* 312 U.S. 546 (1941). Not only may state officials not obstruct access to the courts, but "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut,* 401 U.S. ....., ..., 91 S.Ct. 780, 785 (1971). The Court in *Boddie,* relying on precedents established in the criminal defense context, held that due process of law prohibits a state from denying access to its courts to indigents seeking judicial dissolution of their marriage solely because of their inability to pay court fees and costs. The Court reasoned that where the "judicial proceeding becomes the only effective means

of resolving the dispute at hand . . . denial of a defendant's full access to that process raises grave problems for its legitimacy."[11]

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court recognized that full access to the courts for many prisoners is meaningless unless some form of legal assistance is provided. The Court emphasized that "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality." 393 U.S. at 486. The Court held that unless "the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief" it may not bar inmates from furnishing assistance to other inmates. Mr. Justice White, dissenting, would not have struck down the anti-prisoner assistance regulation but would have ruled in a proper case that "the state must provide access to the courts by insuring that those who cannot help themselves have reasonably ade-

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[11]The Court in *Boddie* found insufficient the state's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment, relying on *Griffin v. Illinois*, 351 U.S. 12 (1956). The state interest did not constitute a "sufficient countervailing justification" for denying the indigents an opportunity to be heard.

Mr. Justice Black, dissenting, distinguished civil lawsuits from criminal prosecutions, stating that "because of this great governmental power the United States Constitution has provided special protections for people charged with crime." But as to cases following *Boddie*, Mr. Justice Black has noted that "once the right to unhampered access to the judicial process has been established, that right is diluted unless the indigent litigant has an opportunity to assert and obtain review of the errors committed at trial. . . . [T]here cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel." *Meltzer v. G. Buck LeCraw & Co.*, 39 U.S.L.W. 3483, 3484 (May 3, 1971).

quate assistance in preparing their post-conviction papers." 393 U.S. at 502. This is precisely what the court below has required the California officials to do in the instant case. Indeed, Mr. Justice White's opinion in *Johnson* states what is basically at stake in the instant case:

> "The illiterate or poorly educated and inexperienced indigent cannot adequately help himself and . . . unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief." 393 U.S. at 498.

This Court's decisions in *Boddie* and *Johnson,* and the earlier decisions in *Griffin v. Illinois,* 351 U.S. 12 (1956), and *Douglas v. California,* 372 U.S. 353 (1963), teach that the states cannot deny to indigents the necessary means for obtaining a fair hearing of their possibly valid constitutional claims. The Court's decisions have recognized practical reality not merely by striking down absolute barriers to the courts but by declaring that *effective* access to the judicial process is required where fundamental interests like liberty are at stake. For example, in *Douglas,* as here, the prisoner was not totally barred from filing his appeal; and in *Johnson,* as here, he was not totally barred from filing his writ. But in both cases, as here, the state practice prevented *effective* use of the judicial process. If a prisoner with a meritorious claim is unable to present it to the court in a way that avoids summary dismissal, he is denied access to the courts. Jailhouse lawyers were permitted by *Johnson*

because of the function they serve—as tools enabling prisoners to bring their claims before the courts. Mr. Justice White noted in *Johnson* that "unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all." 393 U.S. at 499. As foreseen by Mr. Justice White, the district court in the present case found that other tools are needed as well.[12] Just as the paramount interest in making the courts fully available for the resolution of constitutional claims compelled the result in *Johnson*, it requires affirmance of the decision in the present case. Post-conviction remedies theoretically available to all in California are not in fact available if the State denies indigents the legal wherewithal to use them. Because the State denies the prisoner both his livelihood (e.g., to hire a lawyer) and his liberty (e.g., to use a public law library or consult an OEO legal services attorney), the State has erected very effective barriers to the judicial process—unless the State furnishes alternative sources of legal help.

In determining whether California denies imprisoned indigents effective access to the courts, consideration should be given to (1) the special significance of post-conviction proceedings for California

[12] The California Supreme Court has also recognized that *Johnson v. Avery* "heralds the advent of new principles governing the question of prisoner access to legal materials. . . . [W]e are cognizant that the principles of Johnson may, in a proper case, require a judicial assessment of the adequacy of prison libraries to permit legal research of a minimum degree of effectiveness." *In re Harrell*, 2 Cal.3d 675, 695, 470 P.2d 640, 653 (1970).

prisoners, (2) the legal resources required for prisoners to make effective use of such proceedings, and (3) the legal resources actually provided by the State.

1. Significance of California Post-Conviction Proceedings

As this Court noted with regard to federal collateral proceedings in *Kaufman v. United States*, 394 U.S. 217, 226 (1969), "adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." The need for post-conviction mechanisms for relief in California is especially strong because; as noted above,[13] the State has not provided procedures to implement the decision in *Douglas v. California*, 372 U.S. 353 (1963). Consequently, many convicted felons lose through inadvertence their right to appeal. They are, indeed, in precisely the same position as the would-be appellant in California before this Court's decision in *Douglas*—they are left to shift for themselves in identifying errors in their trial and making their initial presentation to the court.[14] See *Prison Writ Writing: Three Essays*, 56 Cal.L.Rev. 342, 363, 373 (1968); *Cf. Rodriguez v. United States*, 395 U.S. 327, 330 (1969). Without

[13] See pp. 7-8, *supra*.

[14] *Cf. United States ex rel. Smith v. McMann*, 417 F.2d 648, 658 (2d Cir. 1969), where Judge Friendly observed that "a state's duty may sometimes be so compelling that continued inaction can fairly be regarded as violating the Fourteenth Amendment." In *Wilson v. Wade*, 396 U.S. 282, 286 (1970), this Court left open the question whether there are any circumstances in which the Constitution requires the State to provide an indigent with a free transcript to aid him to prepare a petition for collateral relief.

some form of legal assistance, they will find themselves excluded "from the only forum effectively empowered to settle their disputes." *Boddie v. Connecticut*, 401 U.S. ....., ..., 91 S.Ct. 780, 785 (1971).

2. Necessary Assistance Required to Obtain A Fair Hearing on Post-Conviction Claims

The California Supreme Court has recognized that in a post-conviction proceeding, "the questions that may be raised . . . are as crucial as those that may be raised on direct appeal." *In re Shipman*, 62 Cal.2d 226, 231, 42 Cal.Rptr. 1, 4 (1965); *cf. Gardner v. California*, 393 U.S. 367, 370 (1969). Nevertheless, counsel is not appointed in such proceedings unless the petitioner makes "adequate factual allegations stating a prima facie case" for relief.[15] 62 Cal.2d at 232, 42 Cal.Rptr. at 5. Given the substantiality and the possible complexity as well as the variety of the issues that may be presented collaterally, it is very unlikely that the average prisoner is capable on his own of stating a prima facie case. The threshold problem for the prisoner is to ascertain whether state coram nobis or state habeas corpus procedures should be invoked.[16]

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[15] *Amici* believe that the decision below can be affirmed without reaching, or even approaching, the question whether prisoners have a constitutional right to counsel in some or all post-conviction proceedings. *But see Mempa v. Rhay*, 389 U.S. 128, 134 (1967), where the Court analyzed prior right-to-counsel decisions that "clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." See also Note, *Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1202-05 (1970).

[16] A petition for a writ of error coram nobis (Cal. Penal Code, Section 1265), is properly filed in the court of conviction. The conditions for its issuance are (1) an error of fact existing at the

Where habeas corpus is appropriate, the petitioner has his choice of three state forums, the Superior Court, the Court of Appeal or the Supreme Court. California Penal Code, Sections 1475, 1508; Witkin, *Cal. Crim. Proc.* 764-65 (1963). All three courts have original habeas jurisdiction and it is not necessary to file first in a lower court. *Id.* In fiscal year 1968-69, about 6,200 post-conviction applications were filed, of which 3,814 were filed in Superior Court, 1,051 in the Court of Appeal and 1,345 in the Supreme Court. Judicial Council of California, *1970 Annual Report to the Governor and the Legislature,* 36. Of the approximately 6,200 applications, about 5,300 were

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time of judgment; (2) the fact does not appear of record or go to the merits of the issues tried; (3) it was not presented at trial for excusable reasons; and (4) knowledge of the fact would have prevented rendition of the judgment. See *California Criminal Law Practice,* California Continuing Education of the Bar, 371-73 (1969). Habeas corpus, on the other hand, is applied for in the court having jurisdiction over the prison, and serves its traditional purpose of inquiring into the lawfulness of the conviction. As a practical matter, untutored prisoners experience difficulty in determining whether coram nobis or habeas corpus is the appropriate vehicle for raising the "factual issue" which they claim invalidates their conviction, and since mislabelling results in filing in the wrong court, an erroneously labelled claim is likely to be dismissed without explanation, regardless of its substantive merit.

For an extreme example of the difficulties encountered by prisoners in states which have not enacted modern post-conviction procedures, see *Marino v. Ragen,* 332 U.S. 561 (1947). Only a handful of states have done so. See generally, Note, *State Post-Conviction Remedies and Federal Habeas Corpus,* 12 William & Mary L.Rev. 149 (1970).

The Emory Law School Legal Assistance For Inmates Program found that some inmates did not even know in what court they had been convicted, and that many did not know the exact nature of the crime for which they were convicted, or the nature of the sentence imposed. See Jacob and Sharma, *Justice After Trial: Prisoners' Need For Legal Services In the Criminal-Correctional Process,* 18 Kan. L. Rev. 493, 621 n. 723 (1970). This is consistent with the experience of *amici* in attempting to assist California prison inmates.

denied without either a hearing or a written opinion. *Id.* at 31. Thus, the typical petitioner received only a postcard stating that his petition was summarily denied, with no clue as to the ground for denial. *Id.* at 34, 37. The typical state petitioner in California has no way of knowing whether he has been denied because of some techical defect in his application (e.g., incorrect venue), a failure to state some material fact, general incomprehensibility of the petition, or reliance on a legal theory rejected by cases or statutes he has never heard of.

The Attorney General asserts here, as he did below, that the petitioner need only state the "facts" of his case in order to obtain a judicial hearing. The court below, however, composed of judges who know what it takes to gain a post-conviction hearing in a busy trial court, exposed the utter unreality of the Attorney General's position (App. 100). Even assuming that the untutored prisoner can clear all the technical and jurisdictional hurdles, he must know *which* facts to present to the court. Even an educated layman is unlikely to be able to differentiate the legally relevant facts in his case. Left to his own resources, the prisoner is likely to omit essential facts, or to bury them in a mass of irrelevant detail.[17] This is particu-

[17] *Cf. United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715 (2d Cir. 1960), where the issue was the need for counsel at a post-conviction hearing. The court said: ". . . rarely will a prisoner have sufficient ability or training to recognize the facts which are important to his case or present his side of the dispute in an orderly manner."

In *In re Williams*, 1 Cal.3d 168, 460 P.2d 984 (1969), the prisoner's third petition for habeas corpus was granted. His two unsuccessful petitions had been based on erroneous legal theories, and

larly true when the essential "fact" is not part of the criminal transaction itself, but rather concerns the constitutionality of the criminal statute, e.g., *Robinson v. California,* 370 U.S. 660 (1962), or the omission of a procedural protection essential to the integrity and reliability of the fact-finding process, e.g., *Pointer v. Texas,* 380 U.S. 400 (1965). In short, "it is necessary to understand what one's rights are before it is possible to set out in a petition the facts which support them. . . ." *Johnson v. Avery,* 393 U.S. 483, 501 (1969) (dissenting opinion of White, J.).

The Attorney General also suggests that the habeas corpus forms provided by federal and state courts are sufficient to enable the unassisted indigent prisoner to present an adequate claim for relief. The inadequacy of the forms for this purpose is discussed in the Annual Report of the Judicial Council of California (1971) at pages 46-47. The Report points out that the California form fails to give any guidance as to what possible grounds and what facts are required for relief, and notes that neither the relevant facts nor the theories are self-evident in any case. Moreover, reliance on forms as the exclusive means of providing access to the courts assumes that

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the existence of a valid claim for relief was not uncovered until he was able to cite the governing case. In *In re Greenfield,* 11 Cal. App.3d 536, 89 Cal.Rptr. 847 (1970), a case in which the petitioner's right to relief turned on the same point of law, the court observed that, "No profession depends upon its books so deeply and vitally as the law. Only the smallest lawyer is too big to use law books." The need for including legal citations in prisoners' petitions is particularly acute because the judges of the rural Superior Courts in which most petitions are filed do not have the assistance of law clerks. See Krause, *A Lawyer Looks at Writ Writing,* 56 Cal. L. Rev. 371, 372 (1968).

prisoners will understand printed documents and instructions well enough to fill them out correctly. The invalidity of such an assumption is noted by the Report, and the general illiteracy, lack of education and intelligence in prisons have been noticed by this Court, *Johnson v. Avery,* 393 U.S. 483, 487 (1969), and documented by commentators. See Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kan.L.Rev. 493, 508 (1970). In short, the untutored and indigent prisoner, even the literate and intelligent one, without access to an adequate library or preliminary legal counselling, is not likely to be able to present a petition clearly setting forth a meritorious claim.

3. The Legal Resources Provided by the State

As noted above,[18] California does not authorize its public defenders to assist in the preparation of post-conviction proceedings. Nor does the State provide for court-appointed attorneys, bar associations or law students to furnish any pre-hearing assistance. California does permit jailhouse lawyers to help other prisoners. And the State does provide the few law books listed in the regulation (App. 41) invalidated by the court below. But that is all.

The Attorney General, instead of filing new regulations providing at least for an augmented library or "some new method" of meeting the legal needs of California prisoners (App. 104-05), has appealed to

[18]See pp. 10-11, *supra.*

this Court, taking the position that the State is not obligated to provide any legal assistance at all to indigent prisoners. As stated above, we believe this Court's decisions on effective access to the courts render the Attorney General's position completely untenable.

There are easily available, relatively inexpensive techniques for providing prisoners with the necessary legal advice and assistance for presenting valid claims. As this Court noted in *Johnson v. Avery*, 393 U.S. 483 (1969), some states make public defenders available to consult with prisoners regarding their habeas petitions. Others have created new post-conviction procedures which permit or require the appointment of private counsel.[19] Still others have developed programs to assist prisoners without the expenditure of public funds, by cooperative action with law schools or privately funded projects.[20] See generally, on the variety of prisoner legal aid programs, Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan.L.Rev. 493, 593-613 (1970).

Courts and commentators have often discussed the economy that can result from improved state post-

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[19]See generally Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 12 William & Mary L.Rev. 149 (1970).

[20]At least one state—New York—has obtained federal funds for this purpose through a grant from the Law Enforcement Assistance Administration. See 5 Crim. L. Rptr. 2277-78 (1969). In 1971 alone, California received $32,999,000 of federal funds under the Omnibus Crime Control Act. *The Recorder*, June 11, 1971, at 1, col. 7. But such funds are apparently being devoted to other purposes.

conviction procedures. By reducing frivolous and repetitious petitions and eliminating the need for piecemeal litigation, assistance programs could effect a substantial saving in judicial time, and reduce the burden on the state agency charged with the duty of responding. See, e.g., *United States v. Simpson,* 436 F.2d 163 (D.C. Cir. 1970); Lay, *Problems of Federal Habeas Corpus Involving State Prisoners,* 45 F.R.D. 45, 49-51 (1968).[21]

The benefits of such programs are not merely speculative. Thus, the volume of state prisoner habeas petitions filed in the federal district court for Western Missouri *decreased* following a great improvement in the state's processing of post-conviction applications. See Oliver, *Postconviction Applications Viewed by a Federal Judge—Revisited,* 45 F.R.D. 199, 204 (1968).[22]

When prisoners are forced to prepare their post-conviction petitions without any form of expert as-

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[21]As one commentator has observed, it is unfair to blame prisoner litigants for the great volume of totally unmeritorious petitions filed while simultaneously denying them the assistance they need to determine whether their petitions have merit or not. Krause, *A Lawyer Looks at Writ Writing,* 56 Cal. L.Rev. 371, 372 (1968).

[22]The outstanding features of the revised Missouri procedure are: (1) it provides for mandatory appointment of counsel if the petitioner's motion presents any question of law or issue of fact (regardless of whether a hearing is required); (2) counsel is required to seek out any unalleged grounds for attack and amend the complaint to include them; and (3) the trial court is required to make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. 45 F.R.D. at 211-13; Mo. Sup.Ct.R. 27.26(h)(i). In Illinois, post-conviction procedures require the public defender to consult with the prisoner, ascertain his claims, examine the record and amend his petition adequately to present any constitutional claims. See *People v. Lyons,* 46 Ill.2d 172, 263 N.E.2d 95 (1970).

sistance, the flood of meritless cases makes it likely that meritorious cases will be overlooked. See *Peters v. Rutledge,* 397 F.2d 731, 738 (5th Cir. 1968). Yet, where prisoners receive proper assistance that discourages frivolous claims and effectively presents meritorious ones, observers have been surprised by the number of valid claims which emerge. See Oliver, *Postconviction Applications Viewed by a Federal Judge—Revisited,* 45 F.R.D. 199, 217 (1968); Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kan.L.Rev. 493, 504 (1970).

In short, there are many techniques for providing the necessary legal resources to make effective use of existing post-conviction remedies. The Court need not choose among them. The district court has required the State officials themselves to develop appropriate legal assistance methods, and they should be free to experiment with whatever alternatives or combinations thereof are best suited to the California situation. But clearly, we submit, the district court was correct in finding that due process of law requires some form of state-provided assistance to California prisoners.

III. CALIFORNIA'S DENIAL OF NECESSARY LEGAL ASSISTANCE TO INDIGENT PRISONERS DEPRIVES THEM OF EQUAL PROTECTION OF THE LAWS.

The district court found not only that California denied indigent prisoners due process of law by depriving them of effective access to the courts, but

also that they were denied equal protection when compared with those convicts who are able to afford retained counsel.

This Court has consistently made plain that access to the courts by indigent prisoners for both appeals and post-conviction proceedings cannot be effectively denied by economic and other barriers. See *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to free transcript for appeal);[23] *Douglas v. California*, 372 U.S. 353 (1963) (right to assigned counsel on appeal);[24] *Lane v. Brown*, 372 U.S. 477 (1963) (indigent may not be barred from appealing denial of state coram nobis by requirement that public defender order transcript); *Burns v. Ohio*, 360 U.S. 252 (1959) (right to seek leave to appeal without paying filing fee);[25] *Smith v. Bennett*, 365 U.S. 708 (1961) (right to bring State

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[23] "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19 (Black, J.). "The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." *Id.* at 24 (Frankfurter, J., concurring).

[24] "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." 372 U.S. at 357-58 (Douglas, J.).

[25] "[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." 360 U.S. at 257 (Warren, C. J.).

habeas corpus proceedings without paying fees);[26] *Long v. District Court,* 385 U.S. 192 (1966) (right to free transcript on appeal from State habeas corpus); *Draper v. Washington,* 372 U.S. 487 (1963) (evaluation of merits by trial judge cannot bar the full appellate review available to non-indigents); *Roberts v. LaVallee,* 389 U.S. 40 (1967) (right to free transcript of preliminary hearing);[27] *Rinaldi v. Yeager,* 384 U.S. 305 (1966) (state may not withhold prisoner's earnings to recoup cost of transcript furnished on appeal); *Anders v. California,* 386 U.S. 738 (1967) (right to assistance of appointed counsel acting as advocate);[28] *Entsminger v. Iowa,* 386 U.S. 748 (1967) (right to full record on appeal assuring complete and effective appellate review); *Gardner v. California,* 393 U.S. 367 (1969) (right to transcript of state habeas hearing); *Williams v. Oklahoma City,* 395 U.S. 458 (1969) (right to free transcript for appeal from conviction of petty offense).

Of course, this does not mean that the state must equalize litigation resources to place all potential claimants on the same footing. But unless the indi-

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[26] "[T]o interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." 365 U.S. at 709 (Clark, J.).

[27] "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." 389 U.S. at 42 (per curiam).

[28] The procedure directed by the Court "will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those who are in a similar situation but who are able to afford the retention of private counsel." 386 U.S. at 745 (Clark, J.).

gent prisoner has legal assistance "reasonably adequate for the task" of presenting a valid post-conviction claim, he will be "surely and effectively barred from the courts," *Johnson v. Avery*, 393 U.S. 483, 499 (1969) (dissenting opinion of White, J.), and the remedy fully available to a prisoner with some money will be denied to the indigent.[29] Such denial of legal assistance minimally necessary to present a valid claim violates the equal protection clause.[30]

The Attorney General contends that the concept of the "affluent" convict is illusory, and thereby dismisses the district court's equal protection holding. But clearly there are *some* prisoners who can pay a retained attorney to counsel them, do their research and draft their petition. As long as there are *any* in this status, we submit, the State cannot—by imprisoning the others and assuring their continued impoverishment—make legal cripples of the indigent prisoners.

Furthermore, California prisoners are disadvantaged not only vis-a-vis their more fortunate fellows but also when compared to the many convicted felons given probation or on parole, who are free to earn enough money to pay a lawyer or consult an OEO legal services attorney or, if they choose, do their own research at available public libraries. Therefore, this case is much like the Court's decision in *Rinaldi v.*

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[29]Of course, there is no rational basis for assuming that indigents' claims will be less meritorious than those of other prisoners. *Cf. Burns v. Ohio*, 360 U.S. 252, 257 (1959).

[30]See generally, Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 25-26 (1969).

Yeager, 384 U.S. 305 (1966). In *Rinaldi*, the Court invalidated a New Jersey practice of withholding prisoners' earnings to reimburse the state for transcripts previously provided. The Court pointed out that others convicted of the same crimes—but placed on probation, given a suspended sentence or a fine—were not subject to the same treatment. The Court held that the New Jersey procedure thus denied prisoners equal protection of the laws.

IV. THE ELEVENTH AMENDMENT DOES NOT BAR THE RELIEF ORDERED BY THE DISTRICT COURT.

The Attorney General asserts that the injunction of the court below is inconsistent with the Eleventh Amendment because it is, in effect, a "raid on the state treasury." This argument is a red herring.[31] The district court's injunction does not require the spending of a single dollar of state money. What it requires is that the defendant officials submit revised regulations providing for some plan of adequate legal assistance to prisoners. The Attorney General has not submitted any plan, but has instead appealed to this Court.

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[31] The Attorney General also urges that the relief granted goes beyond the stipulation of the parties. This point hardly seems worthy of presenting to this Court. Rule 54(c) of the Federal Rules of Civil Procedure states that the judgment "shall grant the relief to which the party in whose favor it is rendered is entitled," even if not demanded in the pleadings. The court should be free to fashion an appropriate remedy that is not expressly excluded by or plainly inconsistent with the stipulation. The state officials will have ample opportunity to be heard on the question of relief when new regulations are filed in the district court.

We assume that regulations complying with the district court's order would likely result in the expenditure of additional state funds, although this is not necessarily so.[32] However, the same is true in practically any case enforcing Fourteenth Amendment obligations. A recent example is the decision in *Swann v. Charlotte-Mecklenburg Board of Education,* 401 U.S. ....., 91 S.Ct. 1267 (1971), where the Court approved a district court order requiring a substantial increase in the amount of busing required to meet constitutional standards of school integration. The Court noted that the school system would have to employ 138 more buses than it had previously operated. *Id.* at 1283, n.12. There are numerous other cases, involving a range of Fourteenth Amendment issues, where the Court has indirectly required the states to expend public funds in order to bring public programs into compliance with constitutional guarantees. See, e.g., *Goldberg v. Kelly,* 397 U.S. 254 (1970) (hearings for welfare recipients); *Turner v. Fouche,* 396 U.S. 346 (1970) (reconstitution of jury lists); *Reynolds v. Sims,* 377 U.S. 533 (1964) (reapportionment of legislative districts).

The Attorney General acknowledges that this Court has effectively ordered the disbursement of state funds in a number of cases (brief for appellants, p. 35). Most closely in point are the decisions in *Griffin v. Illinois,* 351 U.S. 12 (1956), and *Douglas v. California,* 372 U.S. 353 (1963), where the Court in

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[32]See page 26, *supra,* describing alternatives for providing minimal preliminary legal assistance to prisoners from private or federal sources not requiring the expenditure of state funds.

effect required the states to spend money in order to comply with constitutional guarantees in the criminal process. The Attorney General purports to distinguish these cases, however, on the ground that "this was done on direct review of criminal convictions in state courts." This distinction is untenable. We cannot believe that the results in *Griffin* and *Douglas* or any other case where this Court has granted relief resulting in the expenditure of state funds would be any different if the case had been brought (like the present case) as an affirmative civil suit to invalidate a state statute or regulation on constitutional grounds. The Eleventh Amendment does not stand in the way of enforcing the Fourteenth.

CONCLUSION

For the reasons stated, the decision below should be in all respects affirmed.

Dated, June 17, 1971.

Respectfully submitted,

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